In our instant case, it is clear beyond all reasonable doubt that the jeep and the 4 vans (all used and reconditioned) Exh. P14 and Exh. P15, were prohibited goods and were imported contrary to the prohibition. An offence against the Act had been committed and the five vehicles were the subject matter of the offence. Hence despite the acquittal of the Accused, the five vehicles were rightly forfeited.

The case of *PP v. Mat Nawi bin Ismail* [1987] 2 MLJ 366 cited by Counsel for the Accused is of no assistance to the Accused. There, although the Accused was convicted of an offence under s. 111A(2) of the Act (that is, offence of failing to comply with the signal of a customs officer to stop for customs examination), that is not an offence relating to goods. No offence at all had been committed in respect of the goods. The car conveying the goods therefore could not be said to have been used for the commission of any offence under the Act respecting which offence the goods were the subject matter. Hence no question of forfeiture under s. 127 of the Act arose in the circumstances.

The other case of *Syed Abdullah v. PP* [1964] 30 MLJ 48 cited for the Accused upheld the order of confiscation of the rice and the boat because the rice was the subject matter of the offence while the boat was used to convey the rice. The *ratio decidendi* of the case in fact supports the order of forfeiture in our instant case.

For the above reasons, the cross-appeal is also dismissed. The order of forfeiture of the five vehicles (Exh. P14 and Exh. P15 is affirmed.

SYED AMAN SYED HASSAN

v.

MARA INSTITUTE OF TECHNOLOGY

HIGH COURT, KUALA LUMPUR
DATO' LIM BENG CHOON J.
[CIVIL SUIT NO. P 559 OF 1983]
20 NOVEMBER 1992

CONTRACT: Allegation of breach of contract of employment - Plaintiff seeking a declaration that his employment has not been terminated - Principles applicable to grant of declaration on a contract of service.

The plaintiff was appointed to the post of a "warden" by the defendant at their branch campus in Kota Kinabalu although the post of warden was non-existant at that time and the salary paid to the plaintiff was that of a hostel superintendent.

Upon the subsequent creation of the post of warden, the plaintiff insisted upon being appointed to the said post although his qualifications were insufficient to entitle him to the said post.

The defendant subsequently discovered that the plaintiff had furnished false information in his application for employment and when confronted with the fact, the plaintiff opted to resign from his employment, which resignation was accepted by the defendant. Subsequently the plaintiff wrote to the defendant applying to withdraw his letter of resignation which application was rejected by the defendant.

The plaintiff sought a declaration that he was at all material times an employee of the defendant and alternatively for damages for breach of contract on the grounds that his letter of appointment was to the position of "warden" but he was instead appointed a hostel superintendent.

Held:

[1] The relationship of master and servant is essentially contractual. It is created and continued with mutual consent. A letter of resignation which is submitted causes the contract to lose the bilateral relation needed and dissolves the relation created.

[2] Even if the plaintiff did not resign and his services were terminated, there are no special

circumstances to warrant the grant of the declaration. The termination of the services of the plaintiff was brought about by his own act of furnishing false information when he applied for employment with the defendant.

[3] The plaintiff was aware at the time of his appointment that the post of warden was not in existance. Even upon the creation of the post of warden, the plaintiff was not and still is not qualified to hold the post of warden. The defendant cannot be in breach of the contract of employment when the plaintiff himself is not qualified to hold the post of warden.

[4] The defendant was right to reject the plaintiffs claim for special location allowance as the plaintiff was considered as originally recruited in Sabah to serve in Sabah and as such was not entitled to the allowance. The plaintiff has failed to produce any evidence to support his transfer claim for RM4,000 and the defendant rightly rejected the claim.

[Plaintiff's claim dismissed with costs.]

Cases referred to:
Bainbridge v. Smith [1889] 41 Ch. D. 462 @ 474 ***(refd)***
Jawala Prasad v. State of UP AIR [1954] All 638 ***(refd)***
Jairam v. Union of India AIR 1954 SC 584 ***(refd)***
Francis v. Municipal Councillors of Kuala Lumpur [1962] MLJ 407 ***(foll)***

For the plaintiff - Karpal Singh; M/s. Karpal Singh & Co.
For the defendant - Sukhdev Singh Randhawa; M/s. Zain & Co.

JUDGMENT

Lim Beng Choon J:
In the present case the plaintiff alleged that the defendant was in breach of a contract of employment.

From the evidence the following facts can be deduced. On or about June 1973 the Institute of Technology Mara ("ITM") was setting up a Branch Campus in Kota Kinabalu. The plaintiff applied to one Abdul Kadir bin Hassan ('DW1') who was in charge of the said Campus, for a post as warden and his application was accepted. The salary scale of the purported post of warden offered to the plaintiff was RM345 x 21 - 450/478 x 25-578/615 x 25 - 715/738 x 25 - 813. I use the word "purported" to qualify the said post because at that time there was no such post of a warden. The plaintiff himself admitted in his evidence that the post of a warden was non-existing at the material time. Be that as it may the plaintiff commenced working as a "warden" on July 1973 in the Kota Kinabalu Campus. In his application (see Bundle D p. 1) the plaintiff claimed that he had a Sijil Pelajaran Malaysia and an Overseas School Certificate Pangkat Kedua. He also claimed to be in possession of a Certificate issued by the Fakultas Bahasa dan Sastra Universitas Nasional Indonesia showing that he had passed pre-University tests in certain subjects in 1972 (see exhibit 'D1'). As a result of a general revision of the terms and conditions of government and statutory services under what is popularly known as the Harun Report, and the Cabinet Report respectively ITM issued Service Circular Bil. 1/1975 (see Bundle B pp. 3 - 5). By that Circular the plaintiff was offered an adjustment of his salary from RM420 to RM640 and a regional allowance of RM128 per month. In that Circular the post held by the plaintiff was described as Penguasa Asrama (hostel superintendent). The date of appointment was stated to be 14 July 1973. The plaintiff claimed he accepted the offer under protest as the post of a warden was higher than the post of hostel superintendent. However there is no evidence that the plaintiff accepted the offer under protest. On the contrary he signed the acceptance form Borang H entitled Borang Pilihan Sendiri Perkhidmatan Bil. 1/1975 (see Bundle B pp. 6 - 7). Again on 1 January 1976 ITM issued another Surat Pekeliling ITM Bil. 7 Tahun 1977 ("Service Circular 7/1977") (see Bundle B p. 9). By that circular the plaintiff's salary was again adjusted from RM640 to RM720 per month. His post was once again described as hostel superintendent. Again the plaintiff accepted the new salary scale without protest. In 1978 the salary of the plaintiff was again further adjusted from RM720 to RM845 per month by Service Circular Bil. 1 of 1978 (see Bundle B pp. 12 - 14). The post held by him was again described as hostel superintendent. The plaintiff likewise accepted the offer without any condition or protest notwithstanding that it was stated in the Circular that he could accept the offer under protest or make a conditional acceptance. I must mention that in his evidence the plaintiff did say he accepted the offer of adjustment of his salary under protest but he admitted that he did not indicate his protest in his letter of acceptance.

Prior to the adjustments of the plaintiff's salary, the post of warden was created and an advertisement appeared in the New Straits Times on 30 August 1974 and again on 6 February 1975 (see Bundle D pp. 8 and 10) inviting suitable candidates to apply for the post. The salary scale was given as A11-9 RM650 x 50 - 850/950 x 50 - 1150/1300 x 50 - 1500 - A11-2 RM1,600 x 75 - 1825. A candidate who wished to apply must either be in possession of a University degree or a member of the armed forces or police force holding the rank of a Captain or above.

By reason of the aforesaid advertisements of the post of warden, the plaintiff naturally became more persistent in his claim to the said post on the ground that he was originally appointed to the post of a warden. On 7 February 1976 the plaintiff wrote a letter of complaint to one Dato Mansor Osman the then Ag. Chairman of ITM's Administrative Council (see Bundle D p. 5) and sought the latter's assistance to get the warden's post. The matter was apparently brought to the attention of the Ag. Registrar of ITM who duly wrote to the plaintiff a letter of explanation dated 15 March 1976. The relevant part of that letter reads:

> Tuan adalah dilantik bukan sebagai 'Warden' ITM tetapi jawatan sebenar tuan adalah sebagai 'Penguasa Asrama'. Gaji yang telah ditawarkan kepada tuan semasa tuan mula menjalankan tugas adalah dibawah tanggagaji bagi jawatan Penguasa Asrama. Kesilapan yang berlaku disini adalah kesilapan diatas 'nama jawatan' dan bukan gaji yang ditawarkan. (Rujuk kepada Surat Tawaran Pemindahan Gaji Baru dan Sistem Pembahgian Bagi Pekerja-Pekerja di Badan Berkanun di Sabah & Sarawak - Lampiran 'G' - yang telah dihantar kepada tuan dalam mana jawatan yang ditawarkan adalah sebagai 'Penguasa Asrama' di bawah Bahagian II).
>
> Kelulusan yang tuan perolehi tidak memenohi syarat-syarat bagi membolehkan tuan ditempatkan di bawah jawatan Warden. Oleh itu tuan dilantik sebagai Penguasa Asrama bagi menguruskan hal ehwal asrama dan tuan diberi elaun Resident Staff oleh kerana tuan dikehendaki tinggal di asrama bagi melicinkan tugas-tugas yang telah di-serahkan kepada tuan.
>
> (see Bundle D pp. 3 - 4).

In the meantime ITM through their Timbalan Pendaftar Bahagian Perjawatan (DW4) caused a check on the qualification of the plaintiff. An enquiry was made by him by letter dated 21 April 1981 to the Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pelajaran as to whether the plaintiff had been issued with an Overseas School Certificate Grade 2 in 1958 or 1957 (see Bundle E p. 1). The reply he received from the said Pengarah was that from the records of the said Lembaga, the plaintiff was never issued with an Overseas School Certificate as claimed by him (see the letter of the said Pengarah in Bundle E p. 3). DW4 also wrote to the Universitas Nasional Jakarta to enquire about the plaintiff's attendance at the said University and it was confirmed that the plaintiff did pass pre-University subjects and was issued with a Certificate in April 1972. However the qualification obtained by the plaintiff from the Indonesian University was not recognised by ITM or Jabatan Perkhidmatan Awam. The matter was reported to the Jawatankuasa Hal Ehwal Kakitangan ITM. The said Jawatankuasa thereupon held an enquiry on 9 November 1981 in which the plaintiff attended. When confronted with the fact that he was never in possession of an Overseas School Certificate Grade II as stated by him in his application for the post of Warden in July 1973, the plaintiff apparently had to admit that he had never sat for the Overseas School Certificate examination and was not in possession of any such Certificate. As a result the said Jawatankuasa gave him two options *viz*.

(i) either he resigned from his post with ITM or

(ii) the matter would be referred to the ITM Disciplinary Committee and that a police report would be lodged regarding the plaintiff's furnishing false information in his application for employment with ITM. On 6 January 1982 the plaintiff sent his letter of resignation to ITM. It was a short letter containing just one sentence -

> Per: Penamatan Perkhidmatan
>
> Dengan ini saya ingin melahirkan hasrat untuk menamatkan perkhidmatan dengan Institut Tekonologi MARA.

His resignation was duly accepted by letter dated 13 January 1982 and he was told that as from 6 April 1982 his employment with ITM would cease (see Bundle A p. 22). On the same

day that is 13 January 1982, the plaintiff wrote to the Pengarah ITM stating that he wished to withdraw his letter of resignation dated 6 January 1982 and wanted to continue to occupy the post of warden offered to him on 26 July 1973 (see Bundle A p. 23). The Timbalan Pengarah ITM by letter dated 11 February 1982 informed the plaintiff that his application to withdraw his resignation letter was rejected and the decision of ITM to accept his resignation as stated in their letter of 13 January 1982 still applied.

I should also mention that the Setiausaha Jawatankuasa Hal Ehwal Kakitangan ITM wrote a letter dated 16 July 1980 to the plaintiff informing him that the said Jawatankuasa held a meeting on 12 July 1980 in which, among other things, a decision was made to transfer the plaintiff from ITM Kota Kinabalu to ITM Shah Alam. The transfer was to take effect from 1 August 1980 and that as a temporary measure the plaintiff would be paid a salary equivalent to a Penolong Pentadbir. The post of the Penguasa Asrama ITM and the post of Penolong Pentadbir ITM carried the same salary scale.

It is to be noted that the reliefs prayed for by the plaintiff in his statement of claim are:

1. A declaration that the plaintiff is and was at all material times the employee of the defendant;
2. Alternatively, damages for breach of contract;
3. Interest;
4. Costs.
5. Such further or other relief as this Honourable Court deems fit.

Turning to the law, it is clear that the relationship of master and servant is essentially contractual. It is created and continued with mutual consent. Just as the master cannot force the servant to continue to serve him, so also the servant cannot force his service upon the master - see *Bainbridge v. Smith* [1889] 41 Ch. D. 462 @ 474. By the same token if a letter of resignation is submitted the contract of employment looses the bilateral relationship needed and as such may be said to dissolve the relation created. In the case of *Jawala Prasad v. State of UP* AIR [1954] All 638 the petitioner tendered his letter of resignation on 2 February 1953 in which he stated:

> I am therefore sending this my letter of resignation to you with the request that you may kindly **accept it by 3 March 1953** and release me of my responsibilities, otherwise after the expiry date I shall consider myself free of all the responsibility of this office.
>
> (Emphasis supplied)

The Sub-Divisional Officer of the respondent accepted the resignation on 18 February 1953. The petitioner however sent his application to withdraw his resignation on 24 February 1953. His application was rejected by the Sub-Division Officer. The petitioner therefore instituted an action in the Allahabad High Court claiming that he should have been allowed to continue in service. In dismissing the petition Malik CJ said:

> No question of withdrawal could then arise, his resignation having been already accepted. Even if his withdrawal of resignation application had been received **before** the resignation was accepted he could not claim an absolute right to withdraw his resignation. The resignation was unconditional and whether he could be permitted to withdraw that resignation is a matter within the discretion of the appointing authority.
>
> (Emphasis supplied)

The Supreme Court of India in *Jairam v. Union of India* AIR 1954 SC 584 adopted a same approach when it was said that an application to withdraw an offer to resign could be allowed only before the services of the applicant had not been terminated.

Turning to a local case, I would refer to *Francis v. Municipal Councillors of Kuala Lumpur* [1962] MLJ 407 where the Privy Council expressed the following observation at p. 410:

> In their Lordships' view when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will **rarely** be made. This is a consequence of the general principle of law that the Courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the Court.

Assuming for the sake of argument that in the present case the plaintiff did not resign from his post but his services were terminated by the defendant this Court is still bound by the

Privy Council's aforementioned observation and must consider whether in the state of affairs there are special circumstances to warrant this Court to grant the declaration prayed for. On this point it cannot be disputed that the termination of the services of the plaintiff was brought about by his own act of furnishing false information in his original application of July 1973 when he applied for employment with the defendant. Under the circumstances it is absolutely futile to mention that the plaintiff had any excuse let alone any special circumstances to warrant this Court to allow the declaration prayed for. It follows therefore the plaintiff's prayer for a declaration cannot be entertained and must be rejected.

I now turn to his claim for breach of the contract of employment. It is to be noted that he based this claim on the offer of appointment dated 26 July 1973 in Bundle B pp.1 - 2. In that letter of offer he was purported to be appointed as a warden which carried a salary scale as mentioned earlier. Now it is not disputed that at the material time the post of a warden was not in existence. In short there was officially no such post in the ITM scheme of services. When asked by Counsel for the plaintiff in cross examination as to who decided to offer the post of warden to the plaintiff, DW1 explained that he played a major role in the offer. In my reading of DW1's evidence in the light of the evidence as a whole the description of the post of warden offered to the plaintiff was made purely for administrative convenience. What is more important is that the plaintiff himself was fully aware that there was no post of a "warden" in the administrative scheme in ITM in 1973. The salary scale as stated in the letter of offer dated 26 July 1973 (see p. 1 of Bundle A) was equivalent to the salary scale applicable to the post of penguasa asrama. This factor was again known to the plaintiff. However he asserted in his evidence that he accepted the starting salary of RM345 on the understanding that after the post of warden was gazetted he would be paid a starting salary of RM628. He alleged that the representation was made to him by Dato Syed Kechik, the Pengarah of the Yayasan Sabah and Dato' Arshad Ayoub, the Pengarah of ITM. I have no hesitation in rejecting this assertion of his simply because in 1973 nobody could have known whether the post of warden would be created. It was only in August 1974 that the warden's post came into existence. Moreover the salary scale contained in the said letter of offer was the salary scale of the post of hostel superintendent or administrative assistant and not that of a warden since such a post was not in existence at the material time.

Upon the creation of the post of "warden" of ITM there is no doubt that the plaintiff was not and still is not qualified to hold the post which carried with it a starting salary of RM650. Under the circumstances it is to my mind highly unreasonable for the plaintiff to claim that he was entitled to be given the post of a "warden". With his purported qualifications he could only be given the post of penguasa asrama which was later abolished by the creation of the post of administrative assistant. The plaintiff has no ground to complain when he was given the post of penguasa asrama and later the post of administrative assistant. His salary was never reduced - he drew the same pay as was stated in the original letter of offer dated 26 July 1973. Furthermore there is no evidence to show that at all material times he was performing the duties of a warden. In fact the evidence shows that later when the post of a warden was created he was merely required to assist the warden. He was never demoted. The problem merely lies in the wrong description of the post and the plaintiff has not suffered any loss or any of the benefits or reduction of salary. At all material times he enjoyed the same benefits and the same salary as contained in the original letter of offer of July 1973. - Even had he been in possession of the qualifications as stated by him in his application for the post of a warden in 1973 he was not qualified to hold the post when it was subsequently created. Now that it was shown that he did not even have the qualifications as set out in the said application he was not even qualified to hold the post of penguasa asrama or administrative assistant. Nonetheless he was allowed to continue to hold the post of administrative assistant pending action to be taken by the disciplinary board. To my mind all the actions taken by the officers of ITM cannot be criticized. It is therefore futile for the plaintiff to say that the defendant is in breach of his contract of employment when he himself is not qualified to hold the post of a warden or even an administrative assistant.

I should also mention that the plaintiff also complained that he was not paid the special

location allowance to which he said he was entitled under the ITM service scheme. He also alleged his transfer claim amounting to RM4,000 was not paid. Instead he was only paid RM400. As regards the special location allowance, the plaintiff was considered as originally recruited in Sabah to serve in Sabah and therefore he was not entitled to allowance pursuant to Clause 3.1 of Service Circular Bil. 1 of 1980. He was only entitled to regional allowance at that time and he was paid the regional allowance. As regards his transfer claim, he had not produced any evidence to support his claim for RM4,000. Both the claims are to my mind rightly rejected by the defendant.

For the above reasons the action of the plaintiff is dismissed with costs.

TAN KAH SENG & ANOR.

v.

CHI LIUNG HOLDINGS SDN. BHD.

HIGH COURT, SHAH ALAM
DATO' MAHADEV SHANKER J.
[CIVIL APPEAL NO. 11-4-91]
22 JUNE 1992

PRACTICE AND PROCEDURE: Summary Judgment - Application under O. 26A Subordinate Courts Rules 1980 - Supporting affidavit - Deponents averred on the advice of their Solicitor that they believed that there was no defence - Sufficiency of affidavit - Whether sufficient to depose that they believed in somebody else's belief that there was no defence even if that somebody was their own Solicitor.

The plaintiffs had applied for summary judgment in the Magistrate's Court under O. 26A of the Subordinate Courts Rules 1980 (SCR). Their supporting affidavit, *inter alia* contained the following averment: "We have been advised by our Solicitor whose advice we verily believe that the defendant has no defence..."

At the trial court, defence Counsel objected to the sufficiency of this affidavit. He contended that it was mandatory that the plaintiffs should aver that it was their belief that there was no defence. It was not enough for them to depose that they believed in somebody else's belief that there was no defence even if that somebody else was their own solicitor.

The learned Magistrate dismissed the application and the plaintiff appealed.

Held:

[1] The core issue in an application for summary judgment is whether the defendant has shown that he has an arguable defence and not whether the plaintiff has used some rigid form of words to say that he has not as justice is concerned not so much with the form but with the substance.

[2] Order 26A r. 2(2) of the SCR permits affidavits in support of the application for summary judgment to contain statements of information or belief with the sources and grounds thereof unless the court directs otherwise.

[3] Further, O.26A r.2(1) does not require that the affidavit in support of the application